

Tomasz Włostowski\* ■

## SELECTED OBSERVATIONS ON REGULATION OF PRIVATE STANDARDS BY THE WTO

### Abstract

*The article inquires into the status of private standards under WTO law. In this context, it addresses two general questions: to what extent should the WTO Members be held responsible for adoption and maintenance of private standards and how probable is any formal dispute relating to private standards. These broad questions are accompanied by more detailed analysis of two specific WTO treaties: the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. In this regard, the author analyzes the schemes subject to regulation by each agreement (technical regulations, standards and SPS measures), the types of entities whose schemes are regulated (e.g., bodies and entities), and substantive requirements that are actually imposed on such schemes.*

*The article concludes that applying these WTO agreements to private standards would likely cause big legal and interpretative controversies. It also recognized that, given the weak and vague regulations imposed on those non-governmental actors that are subject to WTO law under Articles 13 of the SPS Agreement and Articles 3 and 4 of the TBT Agreement, the “winners” of any WTO dispute would most likely get a Pyrrhic victory.*

### INTRODUCTION

The topic of private standards and law of the World Trade Organization (WTO) has received quite significant coverage in international trade publications, governmental documents and the press. While some materials focus on the impact

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\* **Tomasz Włostowski** is a senior associate with the Brussels office of Hogan Lovells. The article represents his personal views only.

of private standards on developing countries, others concentrate on their impact on small and family farms, compliance with standards set by international standard setting bodies (e.g., Codex Alimentarius Commission, World Organization for Animal Health), transparency aspects, equivalence mechanisms, and others. The purpose of this article is not to comprehensively present the topic of the intersection of private standards and WTO law, but instead to raise a number of specific issues that have not, to the author's knowledge, received significant attention until now, including some basic systemic questions about the nature and purpose of private standards. The article also raises some ambiguities about the specific language and terminology in the two main WTO agreements that are relevant here: the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). While the author raises these questions and provides some initial background and analysis, the author does not purport to, nor seeks to, answer the questions definitively, nor to reach specific conclusions about the coverage of the two WTO agreements and their application to private standards.

This article is structured as follows. In Section 1, the author poses some general questions about the nature of private standards, including: (i) their various types and the consequences that their variety may have for WTO analysis; (ii) the impact that regulation of private standards could have on freedom to conduct business and freedom of contract; (iii) the reason why private standards exist and what their coming into existence tells us about the needs of commerce and consumers; and (iv) what type of market access is guaranteed by WTO Membership and where actions of private parties fit in the WTO context. In Section 2, the author focuses on whether WTO law, as currently structured, is capable of resolving the private standard controversy, including: (i) whether compliance with WTO law is a problem for WTO Members or private entities; (ii) whether WTO Members are likely to raise private standards disputes in the WTO; and (iii) whether the TBT and SPS Agreements, as currently phrased, apply to private standards. With respect to this last section, the author analyzes the schemes subject to regulation by each agreement (technical regulations, standards and SPS measures), the types of entities whose schemes are regulated (e.g., bodies and entities), and what regulations are actually imposed on such schemes.

## 1. GENERAL OBSERVATIONS ON PRIVATE STANDARDS

### 1.1. Diversity of “private standards”

One of the difficulties when analyzing private standards is that they include a very wide variety of schemes that can be distinguished from each other and grouped based on a large number of criteria.<sup>1</sup> These may include the following variables:

Who promulgates the standard – three main types of standards can be distinguished, depending on their originator, with possibly different implications for their treatment under WTO law:

- Individual firm schemes – these are schemes devised (and used) by individual firms; examples cited in WTO documents include Tesco Nature’s Choice or Carrefour Filière Qualité. As they are established by one firm, which is usually subject to the authority of a WTO Member where it is established, there may be a clearly identifiable WTO Member responsible for the firm’s compliance with any restrictions that may be applicable to that private standard and its user. However, as most major retailers operate in a number of markets, this clear attribution may become diluted. Moreover, regulation of such private standards may raise freedom of contract/free market concerns and thus they seem to be least likely to be in any way restricted by WTO regulations.
- Collective national schemes – these are schemes agreed and used by a number of private entities (usually, retailers) all located within one WTO Member. As such, there is also one WTO Member that can be held accountable for their actions and – due to the concerted action-type concerns (a number of companies agreeing on a market practice) – competition concerns may actually speak in favor of such regulation.
- Collective international schemes – these are schemes agreed and used by a number of private entities located within several WTO Members. As such, they escape an easy classification in terms of which WTO Member could potentially be responsible for their actions.

Stated purpose or object of the standard – private standards often differ with respect to stated aims, which may include: (i) food quality and safety; (ii) protection of environment; (iii) animal welfare; (iv) protection of labor standards; (v) development; and (vi) others. Many of them span one or more of these purposes.

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<sup>1</sup> A good overview of such criteria has been prepared by the WTO Secretariat in the Note of the Secretariat: Private Standards and the SPS Agreement, 24 January 2007, G/SPS/GEN/746 (“Note 746”), and some of them are cited herein.

While some purposes may make a difference from a WTO perspective, others may not. For example, private standards, which have food safety as the stated purpose, are presumably more likely to lead to arguments that they may be within the purview of the SPS Agreement as “SPS measures”. The other purposes seem immaterial from a WTO perspective, unless GATT Article XX exemption for animal health or exhaustible natural resources somehow came to play. An additional factor is that – as with many trade restrictions – the stated purpose may not necessarily be the real one. Many non-governmental organizations (NGOs) are likely to accuse some users of private standards of actually being driven by profit and higher market price of labeled goods, with the official private standard causes, such as safe food, labor rights, or environment, being only part of a marketing campaign. To the extent private standards were subject to the SPS Agreement in the first place, this raises an interesting question – to which WTO jurisprudence provides some guidance – on whether private standards that purport to secure safer food, but in reality are strictly marketing ploys to extract higher returns, are any less subject to the SPS Agreement than those standards that are clearly aimed only at securing safer food.

Activity regulated by the standard – standards also differ with respect to the part of production process<sup>2</sup> they seek to regulate. While some appear to target the early stages, others focus on the later ones, including only distribution, while yet some others include a number of steps. One of the central questions from a WTO perspective is whether WTO law recognizes production methods as relevant to its like product analysis. In other words, whether, for example, the fact that growers of vegetables were paid acceptable wages is enough to consider their vegetables “not like” vegetables grown by farmers who were paid less. Here, it seems that the very purpose of private standards is to underscore the differences not in the product itself, but in the way the product arrived with the customer. Thus, to the extent that WTO law does not condone such differences, the very idea of private standards may be in trouble.

Whether the end-user is aware of the standard – another difference between standards is that while some result with a label that is placed on a product and will be visible to consumers, others – mainly the so-called business-to-business (B2B) standards – will not. With respect to the second group, a problem arises as to where to draw the line with respect to what can be called a “private standard” (if one needs to be drawn at all). This is because – from a functional standpoint – B2B private standards are essentially a set of criteria that one business

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<sup>2</sup> As most private standards appear to exist in the field of agriculture and food, the term “production process” is used in the broad sense to include even such initial stages as planting, or breeding or raising animals.

will use to evaluate whether to engage in commercial activity with (e.g., buy goods or services from) another business. Clearly, all businesses (as well as consumers) use some criteria to decide which entities they will conduct business with. This is particularly the case in distribution, where retailers simply are not experts in producing the items they sell, yet they are the ones selling the product to the customers. Therefore, they clearly must have a set of criteria by which they choose which products to carry and which not. Such criteria include the demand for products, their price, potential profitability, potential for liability, reputation of the manufacturer/brand, ability to deliver the product in expected quantities, fiscal solvency of the potential partner, and others. It is somewhat unclear at which point these criteria become “private standards” that are subject to this debate. Is the distinguishing factor the focus on the product’s manufacturing process, as opposed to objective quality of the final product itself? Is it the collective name given to these criteria (i.e., the standard’s name)? Is it the outsourcing of standard-development and certification to third parties?

Subject of the standard – finally, although there is some discussion over private standards for goods, not much focus has been given to private standards in services. As corporate social responsibility themes gain attention, more and more corporations and investors expect their service providers to meet certain criteria that reflect ethical, moral or social values. For example, public companies may be under pressure from shareholders or the general public to require their service providers (e.g., accountants, lawyers, or bankers) to meet certain ethnic, sex, background or sexual-orientation diversity targets. Many U.S. corporations reportedly already inquire about their lawyers’ diversity statistics. It is somewhat likely that some third-party certification process will start allowing service providers to boast certified diversity compliance. Another potential area could be work/life balance (ability to have “flexible” arrangements), ability to take children to work or to work from home. The appearance of private standards in the services area would clearly raise a completely different set of questions, as both WTO agreements usually invoked in the context of the “private standard” debate: the SPS Agreement and the TBT Agreement apply to trade in goods only.

### **1.2. Freedom of contract – Should we regulate private standards at all**

One of the interesting – and often overlooked – issues surrounding the debate about private standards and WTO law is the premise seemingly underlying most arguments about the WTO law’s application to private standards (or the need to amend WTO law so that private standards are regulated): once a product meets all the minimum legal criteria set out by the law, all private business should buy or carry that product, if asked to. Arguments around the application of WTO law to

private standards or its possible amendments to provide for such application have not been publicly – to the author’s knowledge – presented in great detail and still remain in an exploratory phase. Nonetheless, the central premise seems to be that once a product meets all the minimum criteria to be sold on the market – imposed by the importing WTO Member, in compliance with its WTO obligations, including both the SPS and TBT Agreement – then private entities participating in the distribution chain (importers, distributors, retailers) should not be able to impose additional conditions of their own. In other words, there would appear to be some sort of an obligation imposed on the distribution chain to carry any products that meet the minimum government-set requirements. If the purpose of private standards is to distinguish products that have some – subjectively or objectively – superior qualities to the minimum required, then subjecting them to the same requirements as the government minimum standards would essentially equalize them with the government standard, thus depriving the private standard of any meaning. There could, of course, be some other WTO threshold or WTO test devised for private standards, less stringent than for standards imposed by governments (as currently set out in the SPS and TBT agreements), but those are still likely to involve significant costs in proving compliance and therefore are likely to raise objections from the business community.

The underlying ideological question is whether private companies can be forced to contract with entities, which they do not wish to contract with for some reason (usually, commercial), and whether they can be forced to distribute products that they simply do not want to distribute. As the purpose of B2B private standards is for the purchasing businesses to limit potential business partners to only those that fulfill some special characteristics with respect to broadly understood production and acquisition methods, which the purchasing businesses consider attractive, the imposition of any limitations on such private standards will clearly make it harder for them to limit their business partners only to the companies and products they desire. Even putting all elements of costs and efficiency aside, the question is whether it would be acceptable for governments to determine what types of consideration private companies may or may not use when procuring goods or services. Almost every single business in operation today must decide what other businesses it contracts with and in doing so, it relies on a number of criteria. Some of them may be objectively justified, while others may not. However, unless some overarching public policy concerns arise, most legal systems give business free rein in deciding whom to contract with. Many businesses (and consumers alike) focus on best quality for the money, thus price and acceptable quality will be some of the key decision drivers that are related to the product. Other businesses will seek to attract the more affluent customer, and

reliability of its products will be key, with price less central. This is where many of the retail private standards come in, guaranteeing quality throughout the broadly understood production process.<sup>3</sup> In addition, a growing number of businesses focus on niche products that reflect certain lifestyle, ideological or ethical choices rather than focusing on price and quality. In the latter case, the choices are used by the businesses as a marketing tool that allows to lure customers, either because customers can easily find in such establishments the product they are looking for, and/or because they can spend their money and “feel good”, due to presumption as to where their money is going, or because of the sheer idea of being associated with this particular business and lifestyle the business promotes. Some random examples of this latter group (which do not purport to be in any way exhaustive or even predominant) would include: (i) stores, supermarkets and restaurants that focus on “healthy living”; (ii) media (and stores that distribute them) that promote certain political preferences; (iii) cafes that serve only coffee that has been certified; (iv) wineries and/or alcohol stores that offer the best selection of wines/alcohols; or even (v) restaurants or clubs that require a certain dress code or style. Looking at it from a marketing standpoint, as long as certain public policy, honesty, and verifiability of certain claims are met, most free market countries allow businesses to market and advertise their products, or limit the supply, or the type of customers they serve, as they see fit. In each of the above examples, the businesses’ main selling point may be their selectivity – if they had not been selective, their sales and unique business idea would perish.

Although regulation of private standards may affect some of the above more than others,<sup>4</sup> the idea is the same: once the businesses’ selectiveness is subject to government-imposed limits, their ability to distinguish themselves from others may be diminished.

A particularly sensitive question in this context is posed by standards that are established, maintained and used by one business only (such as Tesco’s Choice or Carrefour’s Filière Qualité), in order to distinguish its products either from other products it carries, or from products offered by competitors. Seen from one angle, such private standards are simply private labels – a brand, trademark, in essence, a marketing tool to distinguish and sell their products. Any attempts by the WTO

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<sup>3</sup> It is worth noting that even powerful retailers associated with low cost goods also seem to require meeting some of the supply-chain private standards.

<sup>4</sup> While “healthy living” private standards are likely to find themselves subject to charges that they can be subject to the SPS Agreement as “SPS measures”, for now, it is unlikely that private standards or the WTO discussion would in any way be relevant to dress codes or political preferences.

or governments to regulate under what conditions private companies can use private labels will run into numerous problems. First, it will encounter massive opposition from the business community which relies on private labels. Second, the issue of private standards could become so blurred with general branding and advertisements that it could become legally impossible to isolate private standards as a special category. Third, an attempt to regulate such private brands could lead to insurmountable legal problems in a number of WTO Members, whose constitutions safeguard the ideas of market economy, limits on government regulation, freedom of contract, and free speech (problem likely to arise in the United States).

### 1.3. Why did private standards arise?

Given the private standards prevalence in the market place today, understanding the forces that led to their development in the first place may prove central in deciding how to tackle them. While it is not the purpose of this article to explore that history in great detail, one needs to mention two major developments that appear to have led to the development and rise of private standards. On the one hand, the food scares and outbreaks of major food-related diseases gave a push to food safety related standards. As – in the eyes of the customers and retailers – government-imposed standards did not successfully prevent such outbreaks, the business concluded that a higher level of protection was needed. On the other hand, an increasing sense of social consciousness among the consumers about the corporate and manufacturing practices involved in production of food and manufactured goods (e.g., labor or environmental practices in third countries or treatment of animals in food production), led to the development of private standards addressing these areas. *Nota bene*, the rising concern for environment and labor has not only shown itself in the rise of private standards, but is also reflected in certain other developments in trade policy, such as discussions of these topics in the context of the WTO, or inclusion of environmental or labor provisions in various free trade agreements.

The common thread underpinning both developments appears to be that while a need developed among the consumers to address certain “wrongs” in the production of food and manufactured goods, there must have been a perception that the minimum standards and requirements imposed by governments did not ensure that such needs were met. The underpinning of a market economy is that whenever there is demand, supply would normally follow, which is what the rise of private standards really is: satisfaction of existing demand to ensure the products are “better”. When looked at through this prism, private standards appear to take on a different shape: as opposed to being perceived a trade-restrictive measure

imposed by major corporations limiting imports, they become simply the embodiment of local customers' tastes and preferences.<sup>5</sup>

#### 1.4. Concept of market access

Another big theme underlying discussion about private standards and the WTO appears to be a misunderstanding of the concept of market access that WTO membership purports to guarantee, or at least disillusionment with its failure to guarantee such access. To summarize this tension, the WTO Members that raise the problems with private standards are frustrated that their products, which meet the minimum standards that imposed by importing WTO Members, still cannot successfully enter the market, unless they meet some other set of requirements imposed by non-governmental actors.<sup>6</sup> Some of these requirements appear even to be related, or have similar purpose, to regulations imposed by the importing WTO Members, which have been met by the products. However, as the second set of rules imposed by private standards is usually more stringent, it is that set of requirements which appears more difficult and costly to meet. This is particularly the case if – due to the omnipresence of the standard – it is difficult or impossible to enter the distribution chain without meeting it. This leads to accusations that the market access guaranteed by the WTO is undermined by private parties and the importing WTO Members should act to remedy that.<sup>7</sup>

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<sup>5</sup> See, e.g., Report of the 44th Meeting of the SPS Committee, para. 143 (“It had been pointed out by one Member that private standards and their certification requirements served an important function in providing assurances to buyers and responded to consumer demands in the area of food quality as well as in other areas such as labor and environmental requirements.”).

<sup>6</sup> See, e.g., Communication from Mercosur (Argentina, Brazil, Paraguay and Uruguay: Legal Framework for Private Standards in the WTO, 30 September 2009, S/SPS/W/246), which states at para. 5: “[V]arious Members expressed concern at the significant increase in private standards, which, although not compulsory in the formal sense, and despite not having been adopted officially by Members’ authorities, are in practice becoming requirements for access to external markets”; or Communication from Uruguay: Private Standards, G/SPS/GEN/843, 21 May 2008, which states at para. 6: “[P]rivate standards pose another problem that is every bit as important. Because these requirements are so stringent and costly, they threaten the access of our small farmers to potential markets.”

<sup>7</sup> See, e.g., *Ibidem* at para. 6: “(...) it is clear that WTO Members must ensure that the international commitments they have undertaken within this Organization are not undermined or impaired, thereby affecting the acquired rights of private persons involved in international trade”; and at para. 11: “[Since Marrakesh Agreement and Annexes have] created rights and obligations for individuals and other private actors (i.e., acquired rights), any violation of which should be the subject of proper supervision in order to ensure effective compliance with WTO obligations.”

The importing WTO Members essentially respond that private standards are adopted, used and required by private parties and therefore are not the liability of the importing WTO Member.

It seems that the controversy between both camps is about the meaning of market access that WTO membership was to guarantee: a formal access (i.e., the ability to offer imported product to importers, distributors and customers, who may decide to distribute or buy it), or actual increased market share (e.g., guaranteed sales). While a detailed analysis of this issue is outside the scope of this article, in a very concise summary, the WTO appears to guarantee only that once customs formalities and WTO-compliant technical regulations are complied with, the imported product may be presented to potential buyers on terms equal to the local product. There does not appear to be anything in the WTO agreements that would guarantee or mandate that the distribution chain in the importing WTO Member actually be interested in distributing the product and whether any potential refusal to carry the product is the (direct or indirect) result of unattractive price, quality or private standards, does not appear to make a difference. Unfortunately for the exporting WTO Members, the agreements do not appear to guarantee that someone would actually want to purchase these products or participate in their distribution. To the degree that no one wants to purchase an imported product, because it does not adhere to local demands as set out by local tastes, preferences, or commercial reality (as set out by a private standards), the WTO will most likely not help.

## **2. PRIVATE STANDARDS UNDER WTO LAW**

Having looked at some high-level questions relating to the purpose and wisdom of applying WTO regulations to private standards (questions, which may be relevant to interpretation of the WTO agreements as they stand today, or to their possible amendments), we now move to the strict legal issues related to application of the WTO TBT and SPS Agreements to private standards.

### **2.1. Who is responsible for WTO compliance and why it matters**

#### **2.1.1. Who is responsible?**

As a preliminary note, the central thread underlying all complaints about the alleged non-compatibility of private standards with WTO law is that WTO restricts use of private standards (either by imposing restrictions directly on corporations and if not, then through obligations on governments that should

in turn police users of private standards within their jurisdiction) and if it does not, it should. However, close analysis of the texts of WTO agreements, as well as the enforcement mechanism set out by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), suggests that most of the obligations, as well as consequences of non-compliance, fall on WTO Members alone. In particular, both of the main WTO agreements usually invoked in the context of discussions over private standards, the TBT and SPS Agreements, clearly impose obligations primarily on WTO Members. It seems that unless a provision can be found in either agreement that would make WTO Members directly responsible for regulating private standards within their jurisdiction, such standards would remain unregulated. The focus thus turns on those provisions of the SPS and TBT agreements that purport to impose some type of restrictions directly on schemes adopted by persons or entities other than governments, mainly Articles 3 and 4 of the TBT Agreement and Article 13 of the SPS Agreement.

While we shall look at these articles more closely below, for now the central conclusion is that compliance with WTO obligations that may be imposed on private standards is predominantly the problem of WTO Members and not of the private entities using them. Clearly, obligations incurred by WTO Members have some impact on private entities and sometimes this impact is quite direct. For example, the WTO Agreements on Antidumping,<sup>8</sup> Subsidies and Countervailing Measures<sup>9</sup> and Safeguards<sup>10</sup> regulate the conditions under which private companies can request government protection from imports, or under which imports from private entities can be restricted. Provision of benefits by private entities to other private entities may – under certain conditions – be forbidden by the WTO Subsidies and Countervailing Duty Agreements as government subsidies. Under the TRIPS Agreement,<sup>11</sup> unaddressed violations by private entities of intellectual property rights of other private entities may generate the host country's liability under WTO law.<sup>12</sup> Thus, even though the WTO system imposes obligations on the states, not private entities, that does not, *per se*, preclude some type of restrictions or limits on what private companies may do. But the problem of compliance still remains one for the WTO Members. Only to the extent that pressure on WTO

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<sup>8</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>9</sup> Agreement on Subsidies and Countervailing Measures.

<sup>10</sup> Agreement on Safeguards.

<sup>11</sup> Agreement on Trade-related Aspects of Intellectual Property Rights.

<sup>12</sup> *Ibidem*, Article 41.

Members can be translated into pressure on users of private standards within their jurisdiction would there be any practical impact for affected exporters. It is important to keep this in mind when discussing possible changes to WTO law that would impose direct regulations on private standards and private entities using them, as any change would only clarify that private standards are regulated, but it would not circumvent the problem of enforcement via WTO Members.

### **2.1.2. Unlikely intervention of standard-setting WTO Members**

As set out above, even if it is established that private standards are regulated by the WTO (as a result of WTO Dispute Settlement Body decisions or amendments to the WTO legal texts), another practical problem will arise as to whether the WTO system will be capable or likely to force WTO Members to police private standards within their jurisdiction. It seems that, for a number of reasons, it may be somewhat difficult to force WTO Members to regulate and restrict private entities within their jurisdiction using private standards.

First, as most WTO obligations are complied with through domestic law, a question arises as to the practical or legal means by which WTO Member states would regulate private standards under domestic law. As most WTO obligations deal with what governments, and not private entities, do (e.g., imposition and enforcement of customs duties and internal taxes, protection of domestic producers via trade defense mechanisms, technical and sanitary regulations, grant of subsidies, etc), it is relatively easy for governments to comply with their WTO obligation: they essentially need to regulate their own conduct. However, if private standards were subject to WTO regulations, then WTO Members would be responsible, before other WTO Members, for private actors' actions and their compliance with WTO agreements. A mechanism would therefore need to be created, within the internal legal system of each WTO Member, of ensuring that actions of private entities (i.e., private standards) do not expose that WTO Member to liability. In essence, disciplining private standards would lead the governments to regulate not their own behavior, but the behavior of private entities, something the WTO system was not really built for. Practical questions would arise as to the method by which WTO Members would regulate private standards: would there be a national registration system for private standards, authorization requirement, or others. These options seem, from practical standpoint, quite far-fetched.

Second, these schemes are likely to generate enormous internal opposition from the business constituencies claiming that such regulation is a restriction on the free market, freedom to conduct business and to advertise, freedom of contract, freedom of speech, and the like.

Third, practical experience around WTO procedures and litigation shows that WTO Members do not yield to pressure exerted by accusation of WTO non-compliance, and the threat of litigation or even litigation itself does not always incentivize them sufficiently to change their regulations (and, in this case, as just discussed, since the offending measure would not be a government regulation, but instead a private standard, they would have to think of proper enforcement measures against private entities). Thus, even if private standards were found to be regulated by WTO law, the exporting WTO Members faced with private standard barriers on the importing markets, may not find themselves in a much stronger position.

To summarize, enforcement of WTO obligations on private entities within national jurisdiction is a battle that WTO Members are unlikely to pick, unless they are forced. Also, on the complainant side, only WTO Members that are extremely affected would find merits of bringing such cases before the WTO. Given the uncertainty surrounding the application of WTO law to private standards, the case would be highly speculative, results unclear and diplomatic cost high. It does not help that in most cases, the complainants would likely to be smaller states, with less commercial clout to successfully litigate and, if need be, successfully retaliate. WTO litigation in the food and safety area is quite challenging and difficult. It is not a coincidence that, by comparison with other agreements, surprisingly few WTO disputes have been brought under the TBT Agreement<sup>13</sup> (all challenging “technical regulations” with none challenging “standards”) and only slightly more under the SPS Agreement.<sup>14</sup>

Overall, under the current state of WTO law, these factors may result in practical inability of seriously applying WTO mechanisms to discipline private standards.

## 2.2. Application of the SPS and TBT Agreements to “private standards”

With the above reservations in mind, we now briefly look at the extent to which the WTO TBT and SPS Agreements,<sup>15</sup> as drafted today, may be interpreted to regulate use of private standards.<sup>16</sup>

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<sup>13</sup> *EC – Biotech Products*, *EC – Trademarks/GIs*, *EC – Sardines*, and *EC – Asbestos*. Note, however, that there are some new cases pending now.

<sup>14</sup> *EC – Hormones*, *Australia – Salmon*, *Japan – Agricultural Products II*, *Japan – Apples*, *EC – Biotech Products*, *US/Canada – Continued Suspension*, *Australia – Apples*, and *US – Poultry*.

<sup>15</sup> The application of other WTO regulations to private standards, including those set out in the General Agreement on Tariffs and Trade, are outside the scope of this article.

<sup>16</sup> For another detailed legal analysis, see Annex V to Submission by the United Kingdom: Private Voluntary Standards Within the WTO Multilateral Framework, 9 October 2007, G/SPS/GEN/802.

### 2.2.1. Private standards as subject to WTO regulation

The first problem with analyzing private standards under WTO agreements is that – regardless of whether one or more of WTO agreements can be interpreted to incidentally impose some types of regulations on the use of private standards – none of the WTO agreements was drafted to squarely address them. For example, analysis of the history of the negotiation of the SPS Agreement, as well as testimony of persons involved in its negotiation, confirm that private standards were not mentioned during the drafting of the Agreement.<sup>17</sup> In fact, none of the WTO agreements even uses the phrase “private standards.” Accordingly, even if any of the WTO agreements is held to impose regulations on private standards, it would do so incidentally and only if private standards are found to constitute some other type of restriction which is directly addressed in WTO agreements, such as an “SPS measure” under the WTO SPS Agreement, or “technical regulation” or “standard” under the TBT Agreement.

#### 2.2.1.1. TBT Agreement

The TBT Agreement applies to two sets of schemes relevant to this discussion: “technical regulations”<sup>18</sup> and “standards.”<sup>19</sup> In brief summary, technical regulations are documents laying down product characteristics or their related processes and production methods with which compliance is mandatory.<sup>20</sup> Standards, on the other hand, are documents approved by a recognized body, that provide for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory.<sup>21</sup> Both technical regulations and standards may also include or deal exclusively with terminology, symbols, packaging, marking, or labeling requirements as they apply to a product, process, or production method. In short, the main difference between technical regulations and standards appears to be that while the former is mandatory, the latter one is not.<sup>22</sup>

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<sup>17</sup> Submission by the United Kingdom: Private Voluntary Standards within the WTO Multilateral Framework, 9 October 2007, G/SPS/GEN/802, para. 25.

<sup>18</sup> Articles 2 and 3 of the TBT Agreement.

<sup>19</sup> Article 4 of the TBT Agreement.

<sup>20</sup> Annex 1(1) of the TBT Agreement.

<sup>21</sup> Annex 1(2) of the TBT Agreement.

<sup>22</sup> Although WTO jurisprudence has devoted some attention to the question of whether the purported technical regulation applies to an identifiable group of products, the author does not address this topic as it has no special relevance to the general discussion on private standards.

Technical regulations – on the face of it, it would be tempting to conclude that private standards are not technical regulations, as they are not mandatory. Even some exporting WTO Members raising the private standard problem admit, albeit in general terms, that private standards are not mandatory.<sup>23</sup> This is because private entities can decide for themselves whether or not to claim benefits of meeting the standard and only if they decide to, they must comply with it. However, one needs to be cautious about the meaning of “mandatory”, as the TBT Agreement does not specify whether it means “mandatory” in the legal sense (i.e., a legal obligation to comply under the threat of some legal sanction or penalty), or mandatory in the factual sense (i.e., that, regardless of what the law says, the facts are such that without full compliance with the scheme, the business cannot exist or offer its products). This distinction is very significant, as the most vociferous complaints are generally raised with respect to those private standards that are so prevalent that compliance with them is essentially mandatory to enter the market. Thus, if the word “mandatory” was to be interpreted in the broad sense, i.e., in the sense that a factual must is sufficient (as opposed to a legal must), one cannot exclude that at least some of the private standards – i.e., those particularly omnipresent and widely accepted by the distribution chain – could potentially be qualified as technical regulations and subject to the TBT Agreement. Unfortunately, due to the scarcity of cases decided under the TBT Agreement, there are no guidelines on this point. In the dispute closest – by subject matter – to private standards to date, the panel dealt with the question of whether regulations setting out conditions for certain labeling privileges were “mandatory” within the meaning of the TBT Agreement. The Panel noted that since – by limiting the right to certain labeling to only some products – the regulation simultaneously excluded other products from such labeling, the regulation was an obligatory or mandatory requirement<sup>24</sup> that met conditions for technical regulation. Since in that case the regulation was a law adopted by a WTO Member, this decision

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<sup>23</sup> See, e.g., Communication from Mercosur (Argentina, Brazil, Paraguay and Uruguay: Legal Framework for Private Standards in the WTO, 30 September 2009, S/SPS/W/246, which states at para. 5: “(...) various Members expressed concern at the significant increase in private standards, which, although not compulsory in a formal sense, and despite not having been adopted officially by Members’ authorities, are in practice becoming requirements for access to external markets.”

<sup>24</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indicators for Agricultural Products and Foodstuffs*, WT/DS290/R paras. 7.453-7.456. Although a similar, labeling/naming regulation was analyzed in *EC – Sardines*, the question of “mandatory” nature of the regulation was not central to the dispute, see paras. 7.29-7.30 of the Panel report, not challenged on the appeal.

of course does not address the question of whether a non-governmental scheme would be similarly analyzed.

Standards – with the ambiguity around classifying private standards as technical regulations under the TBT Agreement, it may be tempting – given their generally non-mandatory character – to classify them as “standards”. However, this classification also faces certain problems. As the definition makes clear, a “standard” under the TBT Agreement must be “approved by a recognized body.” The WTO agreements do not clarify some of the key concepts in deciphering what is meant by this phrase. First, they leave unclear what type of “approval” must be conferred upon a private standard for it to be considered a standard under the TBT Agreement. For example, must it be an overt, explicit act of approval (and if so, what type) or is tacit approval/recognition sufficient? For example, if a “recognized body” mentions the private standard in an internal publication, or on its website, could that be considered “approval” leading to it becoming a “standard” under the TBT Agreement? Second, the TBT Agreement does not clarify what a “recognized body” is.<sup>25</sup> Specifically, who does it need to be recognized by, and how is such recognition conferred. Moreover, even the term “body” is not defined, leaving open whether it includes any type of organization (governmental and non-governmental), whether it can be national or international, and whether private companies or even sole entrepreneurs are included.<sup>26</sup>

In addition, it is unclear what the relationship must be between the creator of the standard and the “recognized body.” Particularly telling in this context is that the TBT Agreement, when defining a standard, does not say it must be “adopted” by a recognized body (a word used repeatedly in other parts of the TBT when referring to the creation of the standard),<sup>27</sup> but “approved”, a word not used anywhere else in its text. This suggests that adoption and approval are two separate concepts, which also suggests that the standard can be “adopted” by one body, and “approved” by another. For example, assume that corporation X created and used a private

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<sup>25</sup> See, e.g., argument of the European Communities, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“In the view of the European Communities, standards for the purposes of the TBT Agreement were only those standards developed by ‘recognized bodies’ (...) It was likely that most of the ‘private standards’ referred to by delegations were not developed by ‘recognized bodies’ for the purposes of the TBT Agreement.”).

<sup>26</sup> See, e.g., argument of the European Communities, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“Delegations were also encouraged to consider paragraph 8 of Annex 1 of the TBT Agreement which clearly defined the concept of ‘non-governmental body’. Any measure falling outside the above-mentioned definitions did not fall within the scope of the TBT Agreement.”)

<sup>27</sup> See, e.g., Articles 2, 3 and 4 of the TBT Agreement.

standard. Would corporation X have to be the “recognized body” or can some other “recognized body” approve corporation X’s standard? To give a quick example, some of the SPS and TBT Committee documents mention a number of private standards, including, for example, Tesco’s Nature’s Choice or Carrefour’s Filière Qualité.<sup>28</sup> Would the WTO qualify as a “recognized body” and – while probably mere mention of the standard would not qualify as “approval” – what would the WTO need to do for its act to amount to “approval”? A further complication is that – if one body (e.g., corporation) can adopt a scheme and other (a “recognized body”) may “approve” it, thus making it a “standard” under the TBT Agreement – the possibility exists that the owner and creator of the standard may have no influence over whether or not it is subjected to the TBT (as the act of subjecting it to the TBT Agreement is undertaken by another entity – the recognized body).

### 2.2.1.2. SPS measure

The SPS Agreement applies to sanitary and phytosanitary measures,<sup>29</sup> which are defined as “measures” applied for certain enumerated purposes, mainly to protect human, animal, and plant life and health,<sup>30</sup> which may, directly or indirectly, affect international trade.

Neither the SPS Agreement, nor the DSU (for which the concept of a “measure” is also central) define the word “measure”.<sup>31</sup> This concept has been clarified only in WTO jurisprudence. Although a detailed analysis of what is or is not a measure is beyond the scope of this article, a few observations should be made.

It has been stated earlier (in the context of the DSU, but presumably extends to the SPS Agreement) that “any act or omission attributable to a WTO Member can be a measure of that Member [...]. The acts or omissions that are so attributable are, in the usual case, the acts or omission of the organs of the State.”<sup>32</sup> This raises the question of whether a scheme that has not originated with the government, such as a private standard, could be construed “a measure.” Given

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<sup>28</sup> SPS Committee, Note by Secretariat, Private Standards and the SPS Agreement, 24 January 2007, S/SPS/GEN/746.

<sup>29</sup> Article 1.1 of the SPS Agreement.

<sup>30</sup> *Ibidem*.

<sup>31</sup> Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS/367/AB/R, para. 171. WTO jurisprudence suggests that the word “measure” in the SPS Agreement and the DSU is to be interpreted similarly - *Ibidem*, para. 181 (“[T]he Appellate Body has interpreted the word “measure” in the broad sense, and rejected the notion that only certain types of measures could be challenged in dispute settlement proceedings. Nothing in the text of Annex A(1) suggests a more restrictive interpretation of the word “measure” in the context of the SPS Agreement.”).

<sup>32</sup> *Ibidem*, para. 171.

the context in which prior SPS disputes arose (i.e., challenges to government measures), most of the decisions mention government involvement and use the appropriate terminology.

Under a generally accepted test, the determination of whether the scheme is an SPS measure is a three-step test, which looks at the measure's form, purpose and nature.<sup>33</sup> As for the *form*, the SPS Agreement gives an illustrative and expansive<sup>34</sup> list of what it would consider measures, which "include[s] all relevant laws, decrees, regulations, requirements and procedures."<sup>35</sup> While the first three clearly would not cover private standards, as they are not enshrined in law, the door seems more ajar with respect to "requirements" and "procedures" which make no clear reference to a legislative or regulatory nature of the measure (i.e., that the originator does not have to be the government). There is some discussion in WTO jurisprudence over whether requirements and procedures are part of the *form* of the SPS measure, or, as advanced in *EC – Approval and Marketing of Biotech Products*, part of the *nature* of the measure,<sup>36</sup> but we do not need to settle this problem here. Suffice it to say that requirements and procedures could – potentially at least – be interpreted as forms of measures that include non-governmental schemes.

Even if we accept that private measures could qualify as "requirements" or "procedures", this would only be the first step in subjecting private standards to the SPS Agreement. This is because, to fall within the definition of a "measure", the scheme would have to be applied for very narrow *purposes*: (a) to protect animal or plant life or health from pests and diseases; (b) to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages, or feedstuffs; (c) to protect human life or health arising from diseases carried by animals, plants or products, or from pests; or (d) to prevent or limit other damage from pests. This raises two issues. One is that unless the private standard's purpose or intention is to protect one of the interests mentioned above,<sup>37</sup> it would not qualify as an SPS measure, leaving outside the scope of the regulation all standards dealing with labor, development,

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<sup>33</sup> Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, para. 7.119; Panel Report, *Canada – Continued Suspension of Obligations in the EC Hormones Dispute*, WT/DS321/R, para. 7.420.

<sup>34</sup> Appellate Body Report, *Australia – Apples*, para. 175.

<sup>35</sup> Annex A(1) to the SPS Agreement.

<sup>36</sup> See discussion in Panel Report, *Australia – Apples*, paras. 7.143-7.153; and Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, paras. 7.100 - 7.102.

<sup>37</sup> Appellate Body Report, *Australia – Apples*, para. 172 ("The word 'to' in adverbial relation with the infinitive verb 'protect' indicates a purpose or intention. Thus, it establishes a required link between the measure and the protected interest.").

environment and animal rights. The second one is the issue already raised above regarding the relationship between the stated purpose, and the actual purpose of the private standard. WTO jurisprudence, relying on the phrase that measures are “applied” for enumerated purposes, generally focuses on objective considerations, manifested in the measure itself or otherwise evident from the circumstances,<sup>38</sup> such as the text and structure of the measure, its surrounding regulatory context, and the way in which it is designed and applied.<sup>39</sup> As mentioned above, given that in prior disputes the measures originated with the government, this part of the analysis has usually used terminology and structure suggesting that a measure would need to originate from the government.

As for the requirement that SPS measures subject to the SPS Agreement may, indirectly or directly, affect international trade, it appears that this requirement does not generally pose problems in WTO litigations.<sup>40</sup> Thus, it may be assumed that the requirement will most likely not present a major obstacle to bringing a private standard claim under the SPS Agreement.

### 2.2.2. Types of restrictions imposed by the WTO on private standards

If we conclude that certain private standards may be covered by the TBT or the SPS Agreements, the next question is what type of restrictions both agreements impose on them. This is a two-part question. The first one is whether the TBT and SPS Agreements have provisions imposing restrictions on all private standards potentially captured within their purview (and if not, which are covered and which are not) and the second one is what types of restrictions are imposed on those private standards which are covered by provisions in both agreements. The short answer to the first question is that only private standards established/promulgated by certain specifically named types of organizations/bodies/entities have specific provisions restricting them, while the short answer to the second question is that only very limited and vague restrictions are imposed on those private standards promulgated by organizations/entities and bodies that have specific provisions addressing them.

#### 2.2.2.1. Whose private standards are regulated by WTO law?

Both the TBT and the SPS Agreements include provisions on some types of non-central government schemes (technical regulations, standards, or SPS measures) which are subject to special restrictions set out in those agreements. The

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<sup>38</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>39</sup> *Ibidem*, para. 173; Panel Report, *US – Poultry*, paras. 7.103-7.115.

<sup>40</sup> Panel Report, *Australia – Apples*, paras. 7.120-7.122; Panel Report, *US – Poultry*, paras. 7.87-7.89.

difficulty is that through proliferation of different, undefined and vague terms referring to the originators of the schemes subject to regulation under both agreements, those provisions are essentially meaningless from the perspective of their aim, i.e., allowing exporting WTO Members to enforce both agreements against non-governmental schemes in importing WTO Members. Due to their vagueness, it is somewhat unlikely that they would be invoked to police private standards.

### a) SPS Agreement

Article 13 of the SPS Agreement<sup>41</sup> seeks to address the obligations of WTO Members with respect to certain activities undertaken by actors other than central governments. From the perspective of seeking clarity on WTO regulations applicable to private standards, the central obstacle is the difficulty with identifying whose actions are regulated, each in a different way. This is because the article refers to and imposes different restrictions with respect to five types of actors: (a) other than central government bodies; (b) non-governmental entities within the WTO Members' territories; (c) regional bodies within which *relevant* entities in the WTO Members' territories are members; (d) *such* regional and non-governmental entities, or local government; and (e) non-governmental entities, and imposes different restrictions with respect to each type. Even putting aside the context (which may provide some additional clarity), and accepting that definitions in other WTO agreements may be used to define some of these terms, the article uses (i) the concept of "bodies" and "entities", suggesting they are two separate types of organizations, without clarifying how they are different; and (ii) identifies a number of different types of bodies (other than central, regional, and local government) and entities (non-governmental and regional), again often without suggesting how they are different.

A number of questions arise when one tries to establish what organization would fall under what description. For example, what is the difference between a regional body and a regional entity? Does a regional body need to have members? If there is a non-governmental entity, is there also a governmental entity and what disciplines is it subject to? What makes an entity "regional": is an entity with five subsidiaries in five different countries "regional"? What about an entity incorporated in one Members, but with locations in a number of WTO Members?

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<sup>41</sup> Although Article 13 deals mainly with SPS measures adopted by originators other than central governments, it is curiously entitled "Implementation". That signals that the drafters may have feared circumvention of SPS regulations through measures adopted by actors other than central governments.

## b) TBT Agreement

It is worthwhile to note that while the TBT Agreement uses the concept of a “body”, as does the SPS Agreement, it does not use the term “entity,” in contrast to the SPS Agreement. This suggests that either some type of organizations that are within the scope of the SPS Agreement (entities), are outside the scope of the TBT, or that the term “body” is wider in the TBT Agreement than in the SPS and includes both “bodies” and “entities” as these terms are used in the SPS Agreement.

The next point is that although – in contrast to the SPS Agreement – the TBT Agreement at least purports to define some key terms (including international body,<sup>42</sup> regional body,<sup>43</sup> central government body,<sup>44</sup> local government body, and non-governmental body<sup>45</sup>), the definitions are unclear.

Particularly problematic is the somewhat vague definition of an NGO, which does not clarify what types of non-governmental organization are covered, in particular whether private entities, such as companies, corporations, or foundations are included. Although one would think that defining non-governmental bodies as bodies that are not governmental would be sufficiently wide to include private corporations, contrary interpretations exist.<sup>46</sup>

It also does not help that while the TBT Agreement defines various types of “bodies”, and uses this term (“body”) when addressing technical regulations,<sup>47</sup> it uses a different term (“standardizing bodies”) when addressing standards. This lack of symmetry between terminology with respect to technical regulations and standards may lead to certain interpretative problems. The TBT Agreement does not define what a “standardizing body” is, i.e., at which point a “body” becomes

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<sup>42</sup> Body, whose membership is open to *relevant* bodies of at least all Members (Annex 1(4) of the TBT Agreement).

<sup>43</sup> Body, whose membership is open to *relevant* bodies of only some Members (Annex 1(5) of the TBT Agreement).

<sup>44</sup> Central government, its ministries and departments of any body subject to the control of the central government in respect of the activity in question (Annex 1(6) of the TBT Agreement).

<sup>45</sup> Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation (Annex 1(8) of the TBT Agreement).

<sup>46</sup> See, e.g., response of the European Communities to allegations that private standards are covered by the TBT Agreement, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“Delegations were also encouraged to consider paragraph 8 of Annex 1 of the TBT Agreement which clearly defined the concept of ‘non-governmental body’. Any measure falling outside the above-mentioned definitions did not fall within the scope of the TBT Agreement.”).

<sup>47</sup> Article 3 of the TBT Agreement.

a “standardizing body” and the TBT provisions begin to apply.<sup>48</sup> Since the TBT includes provisions on “non-governmental standardizing bodies”,<sup>49</sup> it is clear that even non-governmental bodies may be “standardizing bodies”. Thus, the practical question is whether any non-governmental body that adopts a “standard”, even as incidental to the body’s main function, is a “standardizing body”, or for example, whether standardization must be a central part of the body’s functions. While the latter definition would capture only organizations focused on standard-setting, the former could capture all originators of private standards, e.g., retailers, distributors or manufacturers of products, for whom standard-setting is only a minor, and incidental, part of their main functions – making, distributing and selling products.

As suggested above, in seeking to decipher what a “standardizing body” is, we should consider why bodies setting standards are called “standardizing bodies”, while bodies adopting technical regulations are simply called “bodies”, and not, for example, “regulating bodies”. While this may at first blush appear to be a theoretical problem, it may have practical consequences, as under one interpretation, this lack of consistency may suggest that not only bodies regularly adopting or approving standards are “standardizing bodies”, but also entities occasionally using them.

There are also other definitional problems in the TBT Agreement, mainly with the definitions of international and regional bodies. For example, the term “relevant body” (central to establishing whether something is an “international body” or “regional body”), is unclear, as it is not specified how, and with respect to what, the body’s relevance is established. Also, while some TBT definitions refer to the bodies’ governmental<sup>50</sup> or non-governmental<sup>51</sup> status, there is no mention whether international and regional bodies include only governmental bodies, or non-governmental as well. In light of lack of clarity with respect to whether

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<sup>48</sup> Although the fact that the substantive provisions on technical regulations (such as Article 3) refer only to “bodies” and provisions on “standards” refer to “standardizing bodies” suggests that standardizing bodies are simply “bodies” when referred to in the context of standards, this does not provide a satisfying answer. For if “standardizing bodies” are bodies that set standards, then bodies that set technical regulations should be referred to as “regulating bodies”. Moreover, if “standardizing bodies” were only “bodies” referred to only in the context of standards, then the word “standardizing” would be superfluous. This suggests that something else is meant and not all bodies setting standards are “standardizing bodies.”

<sup>49</sup> See, Article 4.1 of the TBT Agreement.

<sup>50</sup> See definitions of central and local government bodies.

<sup>51</sup> See definition of non-governmental body in Annex 1(8) to the TBT Agreement.

private entities, such as retailers, distributors and manufacturers are “non-governmental bodies”, there is also no clarity on whether their associations could then be elevated to the status of international or regional bodies.

To conclude, a number of ambiguities must be resolved before we conclude whether the TBT Agreement may impose any restrictions on private standards. If we assume that private standards may be “technical regulations” (due to their factually mandatory character), the problem we face is what “non-governmental bodies” are governed by the TBT provisions with respect to technical regulations (in particular the lack of the term “entities”, which is used in the SPS Agreement). If we assume that private standards may be “standards”, then we are faced with a similar dilemma as above, including the additional query of what is a “non governmental *standardizing* body”.

#### **2.2.2.2. What does WTO law require of WTO Members with respect to private standards?**

If we conclude that some private standards<sup>52</sup> established by certain private entities (i.e., those that can be considered “non-governmental entities” or “non-governmental bodies”), may be governed by the TBT and/or SPS Agreements, the next question is what exact restrictions both agreements impose on such private standards.

Although the provisions are scattered throughout both agreements, they can be reduced to four main sets of obligations, which we analyze together below given their similar language.<sup>53</sup> In essence, the agreements state that WTO Members:

- 1) “are fully responsible” under the agreements “for the observance”:
  - a) in case of *technical regulations* under the TBT Agreement – “of all provisions of Article 2” thereof;<sup>54</sup> or
  - b) in case of SPS measures under the SPS Agreement – “of all obligations set forth” in the SPS Agreement;<sup>55</sup>
- 2) “shall take reasonable measures as may be available to them” to ensure that
  - a) in the case of *technical regulations* under the TBT Agreement: local government and non-governmental bodies within the WTO Members’

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<sup>52</sup> Those that can be considered: (i) “mandatory” thus can be considered “technical regulations”; (ii) “approved” by “recognized bodies”, thus can be considered “standards”; and (iii) targeting SPS objectives, thus can be considered “SPS measures”.

<sup>53</sup> Conformity assessment rules, and how they may be relevant to private standards, are not covered in this article.

<sup>54</sup> Article 3.5 (first sentence) of the TBT Agreement.

<sup>55</sup> Article 13 (first sentence) of the SPS Agreement.

- territories comply with the provisions of Article 2 of the TBT (with the exception of certain notification obligations);<sup>56</sup>
- b) in the case of *standards* under the TBT Agreement: local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they, or one or more bodies within their territories, are members, accept and comply with the TBT Code of Good Practice;<sup>57</sup> and
  - c) in the case of *SPS measures* under the SPS Agreement: non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the SPS Agreement;<sup>58</sup> and
- 3) “shall not take measures which”:
- a) in the case of the *technical regulations* under the TBT Agreement, require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with Article 2;<sup>59</sup>
  - b) in the case of *standards* under the TBT Agreement, have the effect of, directly or indirectly, requiring or encouraging local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they, or one or more bodies within their territories, are members, to act in a manner inconsistent with the TBT Code of Good Practice;<sup>60</sup> and
  - c) in the case of *SPS measures* under the SPS Agreement, have the effect of, directly or indirectly, requiring or encouraging such regional and non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of the SPS Agreement; and<sup>61</sup>
- 4) shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2, in case of *technical regulations* under the TBT Agreement, and of the provisions of the SPS Agreement in case of *SPS measures* under the SPS Agreement, by “other than central government bodies.”<sup>62</sup>

<sup>56</sup> Article 3.1 of the TBT Agreement.

<sup>57</sup> Article 4(1)(second sentence) of the TBT Agreement.

<sup>58</sup> Article 13 (third sentence) of the SPS Agreement.

<sup>59</sup> Article 3.4 of the TBT Agreement.

<sup>60</sup> Article 4.1 (third sentence) of the TBT Agreement.

<sup>61</sup> Article 13 (fourth sentence) of the SPS Agreement.

<sup>62</sup> Article 3.5 (second sentence) of the TBT Agreement and Article 13 (second sentence) of the SPS Agreement.

In a very short summary, these provisions seek to establish a point of reference for each type of scheme adopted by non-governmental actors (for technical regulations, it is Article 2 of the TBT Agreement; for standards, it is the TBT Code of Good Practice;<sup>63</sup> and for SPS measures, it is the SPS Agreement in its entirety) and WTO Members should, generally, strive towards some conformity of such schemes with these reference points.

However, in practical terms, there are a number of problems with these provisions. First, they are vague and weak. By using a number of relative terms (reasonable measures as may be available, not to encourage to act in a manner inconsistent, formulate and implement positive measures and mechanisms in support of), the agreements essentially fail to impose clear and understandable obligations on the WTO Members. What measures are “reasonable”, what measures “may be” (not “are”) available, or what is a “positive” measure are very speculative questions.

Second, some may argue that the above provisions are of secondary importance, because instead of imposing additional obligations on non-governmental actors, they essentially ask WTO Members to ensure that such actors comply with the obligations already incurred under other provisions of the agreements. They do not help us to answer the initial and more important question whether those actors have incurred any obligations under such other provisions in the first place. In essence, the above articles could potentially be construed as jurisdictional articles that do not impose any additional substantive obligations. If non-governmental players had some obligations under other provisions, then these articles reinforce them, but if they did not, then these provisions do not create new obligations.

For example, the response of private entities to a claim that Article 13, third sentence, of the SPS Agreement mandates that private standards must comply with the SPS Agreement could be that, while that is technically true, all other provisions of the SPS Agreement to which Article 13 refers simply do not impose any substantive obligations on private standards (since they apply only to government action and “SPS measures”). Thus, Article 13 is empty. A similar claim could be raised by private entities under the TBT Agreement: although Article 3.1 binds them to comply with Article 2 of the TBT Agreement, the latter article simply does not impose any substantive obligations on private standards (since they are not “technical regulations”). Only the provision dealing with subjecting standards of non-governmental standardizing bodies to the TBT Code of Good Conduct could be construed (if all other conditions are met) to introduce new substantive and procedural obliga-

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<sup>63</sup> Annex 3 to the TBT Agreement: Code of Good Practice for the Preparation, Adoption and Application of Standards.

tions on private standards: duty for WTO Members to take measures to ensure that private entities accept and comply with the TBT Code of Good Conduct.

Third, as a caveat, we have assumed above (to simplify the discussion) that certain obligations within Article 3 of the TBT Agreement apply to technical regulations, certain obligations within Article 4 of the TBT Agreement apply to standards, and certain obligations within Article 13 of the SPS Agreement apply to SPS measures. However, a close reading of these provisions reveals that, in contrast to most of the other provisions of both agreements that clearly specify what types of schemes (technical regulations, standards, or SPS measures) they apply to, these three articles do not actually state anywhere what type of scheme they apply to. While Article 2 of the TBT clearly sets out that WTO Members undertook obligations with respect to “technical regulations”,<sup>64</sup> and most of the substantive provisions of the SPS Agreement clearly indicate that WTO Members undertook obligations with respect to “SPS measures”,<sup>65</sup> the provisions of both

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<sup>64</sup> Article 2.1 of the TBT Agreement (“Members shall ensure that in respect of *technical regulations* (...)”); Article 2.2. of the TBT Agreement (“Members shall ensure that *technical regulations* (...)”); Article 2.3 of the TBT Agreement (“*Technical regulations* shall (...)”); Article 2.4 of the TBT Agreement (“Where *technical regulations* (...)”); Article 2.5 of the TBT Agreement (“A Member preparing, adopting or applying a *technical regulation* (...)”); Article 2.6 of the TBT Agreement (“With a view to harmonizing *technical regulations* (...)”); Article 2.7 of the TBT Agreement (“Member shall give positive consideration to accepting as equivalent *technical regulations* (...)”); Article 2.8 of the TBT Agreement (“(...) Members shall specify *technical regulations* (...)”); Article 2.9 of the TBT Agreement (“Whenever (...) the technical content of a proposed *technical regulation* (...)”); 2.10 of the TBT Agreement (“(...) Member may omit [certain] steps (...), provided that the Member, upon adoption of the *technical regulation* (...)”); Article 2.11 of the TBT Agreement (“Members shall ensure that all *technical regulations* (...)”); and Article 2.12 of the TBT Agreement (“(...), Member shall allow a reasonable interval between the publication of *technical regulations* (...)”).

<sup>65</sup> Article 2(1) of the SPS Agreement (“Members have the right to take *sanitary and phytosanitary measures* (...)”); Article 2(2) of the SPS Agreement (“Members shall ensure that any *sanitary or phytosanitary measure* (...)”); Articles 2(3), 5(1) and 6(1) of the SPS Agreement (“Members shall ensure that their *sanitary and/or phytosanitary measures* (...)”); Articles 2(4) and 3(2) of the SPS Agreement (“*Sanitary or phytosanitary measures* (...)”); Article 3(1) of the SPS Agreement (“To harmonize *sanitary and phytosanitary measures* (...)”); Article 3(3) of the SPS Agreement (“Members may introduce or maintain *sanitary or phytosanitary measures* (...)”); Article 3(4) of the SPS Agreement (“Members shall play a full part (...) to promote (...) development and periodic review of standards, guidelines and recommendation with respect to all aspects of *sanitary and phytosanitary measures*”); Article 4(1) of the SPS Agreement (“Members shall accept the *sanitary or phytosanitary measures* (...)”); Article 4(2) of the SPS Agreement (“Members shall (...) enter into consultations with the aim of (...) agreements on (...) *sanitary or phytosanitary measures*.”); Articles 5(3), 5(4) and 5(5) of the SPS Agreement (“(...) *sanitary and phytosanitary protection* (...)”); Article 5(6) of the SPS Agreement (“(...) when establishing or maintaining *sanitary or*

agreements dealing with schemes adopted by non-governmental bodies or entities (i.e., Article 13 of the SPS Agreement and Article 3 of the TBT Agreement) strangely do not explicitly mention that the obligations incurred by non-central government actors apply to “technical regulations” or “SPS measures”. This same problem applies to “standards”.

Although the title of Article 3 suggests that it deals with technical regulations, the substantive provisions dealing with activities of non-governmental actors are not restricted to “technical regulations”: they simply state that non-governmental actors should comply with certain other provisions of the TBT (mainly Article 2), but not with respect to what specific schemes should Article 2 apply. The natural presumption (given the title of Article 3 and the content of Article 2) is that it only applies to technical regulations, but this omission leaves some doubt. Similarly, Article 3 of the TBT Agreement, apart from its title, does not clarify that WTO Members incur obligations with respect to “standards”. It only seems to regulate the activities of “standardizing bodies” (including non-governmental), but does not specifically clarify that those activities are regulated as far as they deal with “standards”. Finally, Article 13 of the SPS Agreement does not specify in its title or the text that it seeks to regulate the activities of various actors, including non-governmental organizations, with respect to “SPS measures”. Although this conclusion can be perhaps adduced from the general provisions of the SPS Agreement (mainly Article 1(1) thereof), this omission is puzzling. In short, considering the attention that the drafters have given to ensuring that all other provisions of both agreements specifically mention “technical regulations” and “SPS measures”, this omission leaves many questions unanswered and seems to require a deeper analysis.

Fourth, most of the above provisions impose duties on WTO Members to ensure that certain actors (bodies and entities) “within their territories” comply with some obligations with respect to schemes adopted thereby. In the context of today’s international commerce, where the placing of a privately-certified product to a consumer may involve numerous parties – the producer (who may also involve another party, e.g., a contract manufacturer), distributor on the home market, exporter, importer, distributor on the importing market, agent, retailer, standard owner/manager, third party certification/accreditation specialists – it is particularly

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*phytosanitary measures* (...), Members shall (...)); Article 5(7) of the SPS Agreement (“(...) a Member may provisionally adopt *sanitary or phytosanitary measures* (...)); Article 5(8) of the SPS Agreement (“When a Member has reason to believe that a specific *sanitary or phytosanitary measure* (...)); Article 7 of the SPS Agreement (“Members shall notify changes in their *sanitary or phytosanitary measures* (...)).”

important and difficult to determine what type of a nexus must a WTO Member have with the various actors to be able to regulate them. Also, not only the type of nexus with the actor, but also the actor with whom the nexus must be established, must be considered. For example, it would appear non-controversial that a WTO Member of the place of incorporation/establishment of the retailers selling under a private brand would be responsible for stores of that retailer within its jurisdiction. But the situation would be more complex in the case of multinational retail chain with a number of subsidiaries and locations in different WTO Members. Would only the WTO Member responsible for the place of incorporation of the parent company, or of each of subsidiaries, or the location of each of the stores be responsible? And in case of private standards that involve labels on products, would each WTO Member where such product is marketed and sold be competent? Or would a nexus to the retailer or the owner of the standard or the producer be required? If different WTO Members were competent due to the various factors – (i) location of the product/stores; (ii) incorporation of the retailer; (iii) incorporation of the manufacturer whose product bears the label; and (iii) registration of the organization giving/certifying the label/standard – how would such conflicts be resolved?

## CONCLUSION

As set out in Section 2 above, the application of the TBT and SPS Agreements to private standards is an extremely complex legal issue, one that – if it results in applying these regulations to private standards – is likely to leave everyone unhappy. On the one hand, importing WTO Members, with extended retailer and distribution interests, as well as with a conscious and sophisticated consumer base, will be extremely unhappy with subjecting private standards to WTO regulations. This will be coupled with additional reservations, strictly legal, about the wisdom of seeking to mould and force one or both of the two agreements, negotiated to serve an entirely different purpose, to address the private standard issue. A resulting WTO Dispute Settlement Body decision, potentially applying these agreements to private standards, would likely cause big controversies, including legal and interpretative. On the other hand, given the weak and vague regulations imposed on those non-governmental actors that are subject to the WTO law under Articles 13 of the SPS Agreement and Articles 3 and 4 of the TBT Agreement, the “winners” of any WTO dispute would most likely come out empty handed anyway; it would be a Pyrrhic victory.

This must be coupled with a general lack of a broader debate about the high-level issues that are highlighted in Section 1 of this article: (i) whether private standards are the types of issues that are meant for WTO regulation; (ii) how will the rights of private enterprises, enjoying freedoms to conduct business (unless some overarching public policy objectives intervene), be protected; (iii) how will the consumer expectations of obtaining safer and socially-conscious products be protected; and (iv) how should the difference between the regulation of public SPS/safety measures, and private initiatives, be kept separate.

It seems to the author of this article that given the two problems identified in Section 1 and 2, the best way to proceed would be to start with a general debate about issues identified in Section 1. Only once there is a mutual understanding on these issues, a detailed discussion regarding any possible amendments to the SPS or TBT Agreements can take place.

